

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JANET L. VANCE

Claimant

V.

DCCCA, INC.

Respondent

AND

CONTINENTAL WESTERN INS. CO.

Insurance Carrier

Docket No. 1,038,232

ORDER

STATEMENT OF THE CASE

This matter is before the Board on remand from the Kansas Court of Appeals from its July 24, 2015, Memorandum Opinion. The Board heard oral argument on January 14, 2016.

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations as set forth in its original Order of December 27, 2012, together with the January 31, 2014, Memorandum Opinion and the July 24, 2015, Memorandum Opinion of the Kansas Court of Appeals.

ISSUES

The Kansas Court of Appeals concluded the Board misconstrued its earlier decision of January 31, 2014. Therefore, the Court of Appeals remanded this case to the Board with directions to consider Dr. Bieri's impairment rating and any other relevant evidence related to claimant's degree of impairment related to her temporomandibular joint (TMJ) syndrome.

Respondent argues the evidence does not support permanent impairment related solely to claimant's TMJ syndrome. Respondent maintains claimant is restricted to an 8.5 percent functional impairment related to her left leg and is therefore not entitled to a work disability award.

Claimant argues she sustained a 53.5 percent work disability as the result of her February 7, 2007, work injury. Claimant contends her functional impairment percentage is less than her work disability; therefore, the Board need not find a specific functional impairment attributable to her TMJ to arrive at a work disability calculation.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. What additional compensation is due for claimant's work-related TMJ syndrome?

FINDINGS OF FACT

The Board adopts the factual and procedural overview set forth by the Court of Appeals and the Board's Findings of Fact as written in the Board's Order of December 27, 2012. This matter was originally before the Board on respondent's appeal of the June 29, 2012, Award of Administrative Law Judge (ALJ) Thomas Klein. In its Order of December 27, 2012, the Board disagreed with the ALJ and determined claimant was entitled to compensation only as it related to her left knee because she failed to prove her dental and jaw problems were due to her work-related accident. The Board averaged the rating opinions provided by Drs. Bieri and Prostic and found claimant entitled to compensation for an 8.5 percent impairment of function to the left lower extremity.

The Court of Appeals, in its Memorandum Opinion of January 31, 2014, determined the Board erred in finding claimant's TMJ syndrome was not causally related to her work-related accident of February 7, 2007. However, the Court of Appeals found the Board correctly determined claimant offered insufficient evidence to show her tooth loss and related dental problems were caused by her work-related accident.¹

In its July 31, 2014, Order, the Board found:

It is apparent from the Court of Appeals' Opinion, Dr. Bieri's opinions are not to be considered. As such, Dr. Bieri's impairment rating will not be given any weight by the Board. Since no other physician provided an impairment rating for claimant's TMJ, the Board must find claimant has failed to prove, more probably than not, she suffers a permanent impairment of function related to her TMJ.

However, based upon the mandate of the Court of Appeals, the Board finds claimant suffered an injury to her jaw, resulting in TMJ. The Court of Appeals

¹ See *Vance v. DCCCA, Inc.*, No. 112,341, 2015 WL 4579538 (Kansas Court of Appeals unpublished opinion filed July 24, 2015); see also *Vance v. DCCCA, Inc.*, No. 109,294, 2014 WL 349585 (Kansas Court of Appeals unpublished opinion filed Jan. 31, 2014).

adopted Dr. Prostic's causation opinion and noted Dr. Prostic recommended a surgical consultation for the TMJ. Dr. Cornish also recommended treatment for claimant's TMJ. The Board finds claimant is entitled to medical benefits for TMJ and no other dental condition.²

In its Memorandum Opinion dated July 24, 2015, the Court of Appeals wrote:

We, too, have reviewed the panel's decision in *Vance I*.³ The panel discounted only Dr. Bieri's opinion on *causation* of the TMJ syndrome and [claimant's] loss of teeth. And the panel recognized that other expert testimony did establish a causative link between [claimant's] workplace injury and the TMJ syndrome. The panel, however, did not reject Dr. Bieri's impairment rating. On remand, the Board extrapolated the panel's discussion of Bieri's causation opinion and directly applied that discussion as if it included his impairment rating. In doing so, the Board misconstrued and impermissibly expanded the *Vance I* panels' determination.⁴

ANALYSIS

The Court of Appeals remanded this case to the Board, writing:

We recognize that Dr. Bieri offered an impairment rating combining the effects of the TMJ syndrome and Vance's loss of teeth. That, however, is not, in and of itself, a reason to deny benefits to Vance. Dr. Bieri plainly concluded the TMJ syndrome did impair Vance's functioning to a measurable degree. We leave it to the Board and the parties to determine how best to address the issue on remand.⁵

Dr. Bieri assessed a 5 percent impairment for TMJ syndrome, which the Court of Appeals found compensable, and loss of dentition, which the Court of Appeals found not compensable. Dr. Bieri did not apportion his rating and identify the degree of functional impairment related to claimant's TMJ syndrome. Neither party asked Dr. Bieri to identify the extent of functional impairment related solely to the TMJ syndrome. Claimant's functional impairment for TMJ syndrome could be anywhere between .001 and 4.999 percent.

² *Vance v. DCCCA, Inc.*, No. 1,038,232, 2014 WL 3886803 (Kan. WCAB Jul. 31, 2014).

³ 2014 WL 349585.

⁴ 2015 WL 4579538 at 3.

⁵ *Id.*

The Board is duty-bound to follow precedent of our appellate courts and does not have the discretion to choose not to comply with a mandate of the Court of Appeals.⁶

In *Tovar v. IBP, Inc.*,⁷ the Kansas Supreme Court wrote:

. . . medical evidence is not essential to the establishment of the existence, nature, and extent of an injured worker's disability. *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 201, 547 P.2d 751 (1976); *Carter v. Koch Engineering*, 12 Kan.App.2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987). Thus, the district court, as the finder of fact, is free to consider all of the evidence and decide for itself the percentage of disability. 12 Kan.App.2d at 76, 735 P.2d 247.

In accordance with *Tovar*, the Board finds Dr. Bieri's 5 percent functional impairment rating weighed the contribution of claimant's TMJ syndrome equally with her loss of dentition and concludes claimant suffers a 2.5 percent functional impairment as the result of her work-related TMJ syndrome and 2.5 percent related to her loss of dentition.

The Board adopts the findings of the ALJ regarding permanent partial general disability and finds claimant suffers a 100 percent wage loss and a 6.5 percent task loss, resulting in a 53.25 percent work disability.

CONCLUSION

Claimant suffers a 2.5 percent functional impairment for TMJ syndrome related to her February 7, 2007, work-related injury and a 53.25 percent work disability arising from the same injury by accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated June 29, 2012, is affirmed.

IT IS SO ORDERED.

⁶ See *Sager v. Delivery Logistics, Inc.*, No. 1,043,908, 2013 WL 1384372 (Kan. WCAB Mar. 15, 2013); *Johnson v. J&J BMAR Joint Ventures, LLP*, No. 1,012,089, 2005 WL 3407992 (Kan. WCAB Nov. 22, 2005).

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784, 817 P.2d 212, 215 (1991).

Dated this _____ day of January, 2016.

BOARD MEMBER

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DISSENT

The undersigned respectfully dissents from the conclusions made by the majority. The Court of Appeals left it to the Board and the parties to determine how best to address the issue of functional impairment. The Court of Appeals did not issue a mandate that the Board make a finding of fact that does not exist. Claimant did not meet the burden required by K.S.A. 2006 Supp. 44-510e(a) to prove the extent of functional impairment related to her TMJ syndrome. The majority's assessment is simply a guess without any competent medical foundation.

K.S.A. 2006 Supp. 44-501(a) states, in part:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 44-508(g) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 2006 Supp. 44-510e(a) states, in part:

In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guidelines for the Evaluation of Physical Impairment, if the impairment is contained therein.

In order to receive compensation for functional impairment, claimant must prove a loss of a portion of the total physiological capabilities of the human body, expressed as a percentage and established by competent medical evidence and based on the fourth edition of the American Medical Association Guidelines for the Evaluation of Physical Impairment. She must prove the percentage of functional impairment by a preponderance of the credible evidence. She did not.

The phrase “functional impairment” is a term of art with a precise meaning. The majority is arbitrarily affixing the extent of functional impairment when the statute requires the percentage of functional impairment to be proven and expressed as a percentage by a medical provider. The record lacks evidence supporting the specific amount of claimant’s impairment.

The majority relies on *Tovar* to conclude it does not need a specific finding of a percentage of impairment related to claimant’s TMJ syndrome. In *Tovar*, the district court decided the impairment based upon the functional ratings assessed by three different physicians. The issue was whether the district court had authority to weigh the three different ratings and conclude the impairment was somewhere in between the different physicians’ opinions. In this case, unlike *Tovar*, there is no specific assessment of functional impairment related to claimant’s TMJ syndrome by a physician.

The undersigned would reinstate the Board’s prior Order of December 27, 2012.

BOARD MEMBER

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Hon. Thomas Klein, Administrative Law Judge